

United States District Court

For the Northern District of California

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5 IN THE UNITED STATES DISTRICT COURT

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9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 SERVICE EMPLOYEES INTERNATIONAL UNION,
11 DAVID REGAN and ELISEO MEDINA, as trustees for
12 SEIU UNITED HEALTHCARE WORKERS-WEST
13 and fiduciaries of the SEIU UNITED HEALTHCARE
14 WORKERS-WEST AND JOINT EMPLOYER
15 EDUCATION FUND, SEIU UNITED HEALTHCARE
WORKERS-WEST, an unincorporated association and
fiduciary of the SEIU UNITED HEALTHCARE
WORKERS-WEST AND JOINT EMPLOYER
EDUCATION FUND, and REBECCA COLLINS, as a
participant in the SEIU UNITED HEALTHCARE
WORKERS-WEST AND JOINT EMPLOYER
EDUCATION FUND,

16 Plaintiffs,

17 v.

18 SAL ROSELLI, JORGE RODRIGUEZ, JOAN
19 EMSLIE, JOHN BORSOS, JOHN VELLARDITA,
GABE KRISTAL, PAUL KUMAR, MARTHA
20 FIGUEROA, BARBARA LEWIS, PHYLLIS
WILLETT, DANIEL MARTIN, LAURA KURRE,
RALPH CORNEJO, WILL CLAYTON, GLENN
21 GOLDSTEIN, FRED SEAVEY, MARK KIPFER,
AARON BRICKMAN, IAN SELDEN, GAIL
BUHLER, FREJA NELSON, ANDREW REID,
NATIONAL UNION OF HEALTHCARE WORKERS;
MARYRUTH GROSS, CONNIE WILSON, ARLENE
22 PEASNALL, CHERIE KUNOLD, FAYE LINCOLN,
and DOES 1 through 100, inclusive,

23
24 Defendants.

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28 No. C 09-00404 WHA

**TEMPORARY
RESTRANING
ORDER AND
SCHEDULE LEADING
UP TO HEARING ON
PRELIMINARY
INJUNCTION MOTION**

In this controversy between an international union and a splinter group organizing a new
and competing union, the immediate issue concerns restoration of the international's property

1 and information so that it can protect its members. A temporary restraining order is now sought
2 by the international union. After a two-day evidentiary hearing, among other related hearings,
3 the motion is **GRANTED IN PART** as follows.

4 * * *

5 The United Healthcare Workers have been part of the Service Employees International
6 Union since the 1930's. In recent years, however, the leaders of the SEIU and the leaders of the
7 UHW have disagreed over policy matters. This culminated in a trusteeship being imposed on
8 UHW as of January 27, 2009, pursuant to the SEIU constitution. In the run-up to the
9 trusteeship, UHW leaders girded themselves to resist a trusteeship and to undermine the ability
10 of any trustee to govern, *i.e.*, to orchestrate an "ungovernable" situation, as one defendant UHW
11 leader put it in a memo. As the potential trusteeship loomed larger and larger, they allowed
12 stewards and rank-and-file members to organize vigils inside the union offices. Their purpose
13 was to physically resist efforts by any trustee to take the reins of management.

14 When the trusteeship was approved and imposed on January 27, the trustees relieved
15 the individual defendants of management responsibility. In response, the individual defendants
16 went a step further and resigned completely from the union. Immediately, they formed the
17 National Union of Healthcare Workers, a new and competing labor association. In several
18 instances, they departed the offices, knowing that the offices were occupied by the stewards
19 and some rank-and-file who had barricaded themselves inside to resist a trusteeship.
20 Credible evidence has been provided that those remaining inside removed or destroyed records
21 and information.

22 While all individual defendants may not have expressly ordered the havoc or
23 participated personally in it, it seems plain that the individual defendants anticipated the likely
24 course of events once a trusteeship came down afterward, they simply walked away, letting the
25 havoc unfold and, indeed, expecting it to happen. Beyond this, as the trusteeship lurked on
26 the horizon, almost all of the individual defendants established a shadow email system using
27 personal PDAs. Through this system, they discussed how UHW should and would resist the
28

1 international. And, as the eventful day approached, at least one individual defendant emailed
2 UHW documents to his personal account for further use.

3 In short, even at this early stage, considerable and convincing evidence shows that,
4 when the SEIU threatened to impose a trusteeship under the union constitution, the then-leaders
5 of UHW — now the individual defendants — embarked on a vigorous resistance strategy,
6 including a plan to disrupt union operations so as to make the situation ungovernable.
7 When SEIU finally imposed a trusteeship, defendants walked away immediately and, one day
8 later, formed a rival union, namely the NUHA. Forming a new union after the fact, of course,
9 was lawful. What was not lawful, however, was filching or sabotaging of UHW property and
10 information or aiding and abetting others in doing so.

11 * * *

12 This order is anchored in the principle that all communications, information or property
13 made or acquired by any officer or employee of UHW in the course of their employment
14 belongs to UHW. This would include notes, emails, letters, memos, forms, post-its, badges,
15 photographs and so on — any *information*, however recorded, and any *property*, however
16 embodied. This would also include any and all information pertaining to the UHW resistance
17 scheme, for all of that was — up until the moment of the trusteeship and notice thereof — done
18 in the course of employment for UHW.

19 Defendants have drawn a distinction between “official property” versus all other
20 materials. This is a counterfeit distinction. *Any* information generated by a UHW employee
21 or agent in the course of his or her UHW employment, including information regarding how
22 UHW should resist any trusteeship efforts, *belongs to UHW*, not to the individual employees
23 or agents. Although new management has assumed control of UHW (and has done so through
24 a process of uncontested legitimacy), the change in management does not change the fact that
25 UHW still owns the information and is entitled to get it back — even if it means that UHW’s
26 new management will learn of the details of the resistance scheme. Nor does informality
27 matter. It does not matter that UHW information was placed on informal notes or placed by
28 defendants on private cell phones or Blackberries (or other PDAs). *Any* information recorded

1 in *any* manner in the course of UHW employment, including UHW efforts to resist any
2 trusteeship, belonged to UHW at the time and *still* belongs to UHW today.

3 With this in mind, certain terms used in this order will be understood to mean as
4 follows. "UHW information" means information communicated or acquired by any UHW
5 officer or employee in the course of his or her employment. "Electronic UHW information"
6 means such information stored in electronic form, such as e-mails, text messages, voice mails,
7 digital photographs or videos and word-processed documents. "Non-electronic UHW
8 information" means all other UHW information. "UHW property" includes all "UHW
9 information" as well as any other item purchased with UHW funds or acquired for UHW
10 purposes by any officer or employee of UHW.

11 The record clearly shows that UHW information and property were removed from or
12 hidden within various UHW offices in the wake of the trusteeship. There is much evidence
13 that at least some of them were removed or hidden by confederates of the individual defendants
14 whom they allowed to seize the offices in protest to an impending trusteeship. If defendants did
15 not themselves take or hide the missing materials, then it seems probable that many materials
16 were taken or hidden by their confederates with their tacit blessings.

17 If defendants have commingled UHW property with their own personal property —
18 such as by using their private PDAs to do UHW work — that is a problem of their own making
19 and is no defense to having to return the UHW information and property. Although this order
20 will provide an opportunity to sort the private material from UHW material, the main burden
21 and cost of doing so should fall on those who commingled in the first place rather than on
22 UHW.

23 Nor does it matter that a UHW server may have backed up some emails or other
24 electronic information. It did not do so for all. While it is true that most of the emails are not
25 as important to recover immediately as are the grievance and collective bargaining files, the
26 emails may help show what became of those critical files and who last had them. So the emails
27 are of urgency as well as an evidentiary avenue to locate the grievance and collective
28 bargaining files.

1 To be sure, *some* of the records may be missing because of plaintiffs' own
2 mismanagement and confusion over records after the trusteeship began. This fact, however,
3 does not eclipse the main conclusion that other materials were taken or hidden by individual
4 defendants or by their confederates. For example, some grievance files and collective
5 bargaining files were plainly taken away from some locations by dissidents. UHW needs the
6 materials back to run the union and to protect its members. Accordingly, a sufficient record
7 has been made to warrant the limited relief set forth below.

9 While this order is intended to deny defendants any direct access to UHW property
10 and information, it does not go so far as to bar defendants from “using” such information, at
11 least at the TRO stage. There are several reasons for stopping short. Once the materials (and
12 all copies) are returned, much of it will still be mentally remembered by defendants. In this
13 limited sense, they will be allowed to use the information to build a rival union, for much of
14 the information would have been remembered by defendants even if they had faithfully turned
15 over all UHW property when they left. They cannot be expected to wipe their minds clean.
16 For example, surely they would have known who were already union members and would have
17 known from experience which members could be counted on to go an extra mile. It would be
18 unfair to bar defendants from using information they would have remembered even if they had
19 behaved correctly. Much of the information, moreover, is also in the public domain or widely
20 known or, at the very least, has not been shown to be a true trade secret. Forms, badges,
21 checklists, fliers, images of public events are some examples. It would be wrong to deny
22 defendants the right to use information they could have acquired with only minimal effort
23 from other readily available sources. And, to grant an injunction against “use” would lead to
24 interminable contempt motions. These would be difficult to sort out, involving as they would
25 issues of mental state and the considerations above. They would consume resources worth far
26 more than any practical point at stake. The two sides are locked in a struggle for the hearts and
27 minds of the rank and file. Industrial democracy is at work. A constant stream of litigation
28 motions as to whether defendants have been mentally trying to remember what names were on

1 various lists and memos would, without advancing any practical point of ownership, unduly
 2 chill the organizing rights of defendants. Finally, we must bear in mind that plaintiffs' most
 3 pressing point of irreparable injury is their loss of grievance and collective bargaining files,
 4 which are needed for the ongoing — even immediate — representation of union members.
 5 Requiring these to be returned will aid that cause. Requiring defendants to forget what was
 6 in those files will not.

7 To be very clear, defendants may not retain electronic or hard copies and "use" those
 8 materials. They may only "use" what they happen to have remembered and must return *all*
 9 embodiments of UHW property and information.

10 * * *

11 This is a Section 301 action to enforce the following provision in the SEIU constitution:

12 *Article VIII, Section 7(b):* "The Trustee [appointed pursuant to
 13 Section 7(a)] shall be authorized and empowered to take full
 14 charge of the affairs of the Local Union or affiliated body and its
 15 related benefit funds, to remove any of its employees, agents
 16 and/or trustees of any funds selected by the Local Union or
 17 affiliated body and appoint such agents, employees or fund trustees
 18 during his or her trusteeship, and to take such other action as in his
 19 or her judgment is necessary for the preservation of the Local
 20 Union or affiliated body and for protection of the interests of the
 21 membership."

22 *Article VIII, Section 7(c):* "Upon the institution of the trusteeship,
 23 all moneys, books and property of the Local Union or affiliated
 24 body shall be turned over to the Trustee."

25 *Article VIII, Section 7(e):* "The Trustee shall take possession of all
 26 the funds, books, papers and other property of the Local Union or
 27 affiliated body"

28 Contrary to defendants, a Section 301 claim may be asserted against *individual*
 29 defendants so long as only *injunctive* relief is sought, as here. While the Ninth Circuit has not
 30 definitively ruled on the issue, the *Reis* decision barred only *damage* claims against individuals
 31 under Section 301. This order is limited to *injunctive* relief.

32 * * *

33 Based on the extensive record and the multiple hearings, including live witness
 34 examination at a two-day evidentiary hearing, this order finds that plaintiffs have established a
 35 likelihood of success on the merits as well as a likelihood of irreparable injury should relief be

1 denied. It is worth pointing out, however, that virtually all of the following relief can be and is
2 alternatively based on the district court's authority to manage civil discovery, including the
3 preservation of evidence, independent of the merits and the usual provisional relief standards.
4 Consequently, the NUHA and the individual defendants listed below are ordered to do the
5 following pending resolution of the motion for a preliminary injunction:

- 6 1. Until the evidence is turned over as set forth below, defendants
7 must preserve any and all UHW property within their possession, custody and
8 control and to continue to comply fully with Paragraph 4 of the Supplemental
9 Order to Order Setting Initial Case Management Conference in Civil Cases
10 Before Judge William Alsup (an order both sides must honor).
- 11 2. Defendants must return immediately to UHW all non-electronic
12 UHW information and copies thereof without making further copies. This should
13 be done through Attorney Dan Siegel. Full turnover to plaintiffs must occur by
14 **APRIL 16, 2009.**
- 15 3. Defendants must immediately cause complete images to be made
16 of *all* electronic information resident on *any* computer, Blackberry, PDA, cell
17 phone or other electronic storage medium in their possession, custody or control
18 regardless of whether the device is or was a UHW device and regardless of
19 whether the device was or is privately owned or acquired. The imaging must
20 include *all* information, not just UHW information. A procedure will be provided
21 to sort private and/or privileged material from UHW material. The images and
22 the devices must be retained by Attorney Dan Siegel for safekeeping pending
23 further order. Written notification of compliance must be given on a
24 name-by-name basis to plaintiffs' counsel by **APRIL 16, 2009.**
- 25 4. No later than **APRIL 16, 2009**, Attorney Siegel shall provide
26 counsel for UHW copies of all UHW information referenced above save only
27 those for which a good-faith assertion of privilege is made and/or for which it
28 appears conclusively that the subject matter is wholly private with no relationship

1 to UHW. Any withheld material shall be catalogued and identified in a log in
2 accordance with Paragraph 16 of the Supplemental Order, said log also to be
3 supplied by April 16. By **APRIL 16**, Attorney Siegel must bear the burden to
4 bring a motion for protective order before Magistrate Judge Maria-Elena James
5 to justify withholding of any privileged material. The burden to obtain wholly
6 private information, however, shall be on plaintiffs.

7 5. The foregoing temporary restraining application applies against the
8 National Union of Healthcare Workers and the following individual defendants:

9 John Borsos	10 Aaron Brickman	11 Gail Buhler
12 Will Clayton	13 Joan Emslie	14 Glenn Goldstein
15 Mark Kipfer	16 Gabriel Kristal	17 Paul Kumar
18 Barbara Lewis	19 Freja Nelson	20 Fred Seavey
21 Ian Selden	22 Sal Rosselli	23 John Vellardita
24 Phyllis Willett		

15 6. All deadlines are at noon of the date stated.

16 * * *

17 Under Rule 65(c), the Court may issue a temporary restraining order "only if the movant
18 gives security in an amount that the court considers proper to pay the costs and damages
19 sustained by any party found to have been wrongfully enjoined or restrained." The briefing has
20 overlooked this issue. Nevertheless, the Court feels that security is required. In the Court's
21 judgment, a bond of \$50,000 will be sufficient to cover such costs and damages. This bond
22 must be posted by **APRIL 14, 2009, AT NOON**. The TRO, however, is effective immediately.
23 Attorney Dan Siegel is hereby ordered to provide each defendant subject to the TRO with a
24 copy thereof within 24 hours of issuance of this order and to direct them to read it.

25 * * *

United States District Court

For the Northern District of California

1 For the preliminary-injunction hearing, the parties have agreed on the following
2 schedule, hereby adopted by this order (all deadlines are at noon).

3 1. By **APRIL 16, 2009**, both sides shall answer the interrogatories
4 propounded by the Court and appended hereto.

5 2. Between **APRIL 20 AND MAY 15, 2009**, each side may take up to
6 ten 3-1/2-hour depositions, not limited to parties, in alternating weeks as agreed
7 at the hearing. The individual defendants, if selected for deposition, shall bring
8 to their depositions all UHW property in their possession, custody or control.

9 Note that, by this stage, all such materials should have been turned over to
10 Attorney Dan Siegel, who shall bring them to the deposition. Narrowly tailored
11 subpoenas duces tecum may be served on non-parties.

12 3. By **JUNE 1, 2009**, plaintiffs shall file and serve their opening
13 memorandum which shall be organized by facility, by individual defendant, and
14 by item allegedly taken or hidden by said individual defendant and shall quote
15 verbatim all evidentiary passages showing guilt. To accommodate this format,
16 plaintiffs may have up to forty pages. Plaintiffs may also submit up to twenty
17 additional (double-spaced) declaration pages — but no more (in light of the vast
18 number already submitted).

19 4. By **JUNE 15, 2009**, defendants may oppose, using up to 55 pages
20 and twenty pages of declarations and using the same format for presentation and
21 organization.

22 5. By **JUNE 22, 2009**, plaintiffs may reply using up to fifteen pages of
23 memoranda and no additional declarations.

24 6. A hearing will be held at **8:00 A.M. ON JULY 15, 2009**.

25 7. All discovery disputes have already been referred by an earlier
26 order to Magistrate Judge Maria-Elena James. Counsel are required to bring all
27 discovery motions in time to still meet the stipulated schedule above, taking into
28 account the time Magistrate Judge James must have to decide. Put differently,

1 please do not ask for relief from the schedule because no discovery ruling has yet
2 been obtained.

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4 **IT IS SO ORDERED.**

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6 Dated: April 8, 2009.

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Wm. Alsup
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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